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Employment Discrimination Class Actions After Wal-Mart V. Dukes

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Michael Selmi

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EMPLOYMENT DISCRIMINATION CLASS ACTIONS AFTER *WAL-MART V. DUKES*

*Michael Selmi and Sylvia Tsakos**

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I. INTRODUCTION

The Supreme Court's decision in *Wal-Mart v. Dukes* was seen as a potential game-changer.¹ The lower court had certified the plaintiffs' million-member class in a lengthy and careful decision that had been twice affirmed by the Ninth Circuit Court of Appeals² When the Supreme Court vacated the class certification, there was a sense that the decision might mark the death-knell of employment discrimination class actions based on claims of intentional discrimination.³ This was

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2. The en banc decision from which the Supreme Court opinion sprung is available at *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc). A three-judge panel issued an earlier decision upholding the district court's class certification opinion. See *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007). The district court's certification decision was issued seven years before the Supreme Court opinion. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

3. For a sampling of the initial responses, see Warren Richey, *Supreme Court Dismisses Women's Class Action Lawsuit Against Wal-Mart*, CHRISTIAN SCI. MONITOR, June 20, 2011, at A1 (noting that Marcia Greenberger of the National Women's Law Center called the ruling "a devastating decision"); Steven Greenhouse, *After the Wal-Mart Decision: Heavy Blow for Big Cases and Lawyers Who Bring Them*, N.Y. TIMES, June 21, 2011, at B1 (discussing difficulty the Supreme Court decision posed for future class actions); David G. Savage, *Wal-Mart Bias Case Tossed Out: High Court Makes Filing Class-Action Discrimination Suits Much More Difficult*, BALT. SUN, June 21, 2011, at 7A ("Columbia University law professor John Coffee said the *Wal-Mart* ruling all but

particularly important since there had been a wave of such cases prior to the *Wal-Mart* case.⁴

The view of *Wal-Mart* as a game changer has proved inaccurate, though the decision seems to have significantly affected the number of case filings.⁵ The reduction in filings is an important development, but when one reviews the cases interpreting *Wal-Mart*, it appears that courts are proceeding much as they did prior to the Supreme Court decision. Employment discrimination class actions have never been easy to certify, nor have they been plentiful, and that remains true today. At the same time, courts that were receptive to class action claims prior to the *Wal-Mart* decision appear to remain receptive after the decision. As a result of *Wal-Mart*, the analysis by the lower courts varies somewhat, but the results are largely the same; to the extent a court would have certified the claim before the Supreme Court decision it will likely still be certified. Moreover, various efforts by defense attorneys to stretch the *Wal-Mart* decision to have claims dismissed even before a certification hearing have largely failed, although those efforts have undeniably escalated in the last several years.⁶

This development in the law of employment discrimination class actions may seem puzzling at first glance, but when the Supreme Court decision is dissected closely, the reason for its limited effect becomes clear. The Supreme Court based its decision on a general hostility to class action litigation and, more specifically, to the particular substance and scope of the *Wal-Mart* litigation. Indeed, *Wal-Mart* presented a perfect storm for the conservative wing of the Supreme Court: a class

sounds the death knell for class-action lawsuits that seek money damages from employers.”).

4. Although the Supreme Court decision was not handed down until 2011, the case was filed a decade earlier and followed on the heels of high profile discrimination cases (and settlements) against Home Depot, Texaco, Coca-Cola and a number of other large companies. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249 (2003).

5. It is difficult to measure class action filings, not only because there are no statistics on the number of employment discrimination class actions filed, but also because many cases that include class allegations may never proceed to class certification. One measure of activity is the annual report produced by the law firm Seyfarth Shaw, which reviews all published decisions. The 2014 Report indicated that class filings appeared to be down; cases that proceeded as class actions tended to be smaller; and settlements were also fewer and smaller in nature. This all suggests that *Wal-Mart* had a significant effect on filing behavior. See SEYFARTH SHAW, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 2-6 (2014 ed.), available at <http://www.workplaceclassaction.com/files/2014/01/CAR-2014.pdf>.

6. Prompted by *Wal-Mart*, defendants have aggressively sought to strike class allegations from complaints without the benefit of any certification proceeding. See *Chen-Oster v. Goldman Sachs & Co.*, 877 F. Supp. 2d 113 (S.D.N.Y. 2012) (denying motion to strike); *Simpson v. Boeing Co.*, 27 F. Supp. 3d 989 (E.D. Mo. 2014) (denying motion to dismiss class claims).

claim alleging complicated issues of discrimination against a controversial defendant that was then placed in the hands of Justice Antonin Scalia. The end result was a blustery decision that, with one important exception, has been reasonably easy to distinguish and has produced few converts. The exception was the unanimous part of the Court's opinion holding that class claims seeking individual monetary relief must be certified under Federal Rule of Civil Procedure 23(b)(3), rather than the far less expensive 23(b)(2) method, and that the cases cannot rely on a formula to determine damages.⁷ To date, this part of the opinion has received little attention, in part because these class cases take so long to adjudicate, but the switch to 23(b)(3) certification imposes substantial additional costs on plaintiffs who seek to pursue class claims.

This Article explores the ramifications of *Wal-Mart* approximately five years after the case was decided. While five years hardly provides definitive data on how the case will be interpreted, it is possible to identify trends in the cases that have been decided to date—trends that are likely to provide insight into the future of class action claims. That future suggests that there will be fewer, and perhaps no, nationwide class actions in cases that do not involve a clear challenged practice (any such cases are likely to be disparate impact cases) and that the prospect for class certification will turn on the strength of the claim presented and the jurisdiction where certification is sought. All three of these conditions—no nationwide class actions, the importance of the merits, and the jurisdiction—were present prior to the Supreme Court decision and represent only a modest change in direction. Equally important, class claims based on subjective employment practices remain viable despite the evident hostility to those claims reflected in *Wal-Mart*.

II. THE PROBLEM WITH CLASS ACTIONS

In *Wal-Mart v. Dukes*, Justice Antonin Scalia begins the analytical portion of the majority opinion by noting, “The class action is an exception to the usual rule that litigation is conducted on behalf of the individual named parties.”⁸ If by exception the Court meant empirically exceptional rather than the norm, no one could dispute that fact. Class actions have always comprised a small percentage of civil cases, including in the area of employment discrimination. But the Court—as

7. See *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2558-60 (U.S. 2011). See also discussion *infra* Part III.

8. *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682 (1979)).

reflected in the rest of its majority opinion—seems to mean something different from a mere empirical observation.

To many, and this appears to include a majority of the current Supreme Court, class actions are aberrational and out of place in the world of civil lawsuits because they pose certain risks to defendants.⁹ In particular, the cost of litigating class actions, combined with the potential liability to a class of individuals, can place substantial pressure on defendants to settle cases: not because the claims are meritorious, but because they are expensive. For example, *Wal-Mart* was litigated for nearly ten years before the Supreme Court dismantled the class, and the company's potential liability exceeded several billion dollars.¹⁰ The needed investment to litigate such a large claim and the potential liability places substantial pressure on defendants to settle and, relatedly, creates incentives for plaintiffs to pursue claims solely with intent to extract a settlement. This focus, however, on the costs to defendants ignores the substantial costs and risks to plaintiff attorneys. In the *Wal-Mart* litigation the plaintiffs litigated the case for ten years and accumulated substantial costs that were never recouped. No plaintiff would take on such a case lightly. It is also worth noting that Wal-Mart did not settle the case during its ten-year life nor was there any indication that the plaintiffs pursued the case with an eye towards producing a nuisance settlement. In other words, in the case used to highlight the problem of class action litigation, there is no indication a nuisance settlement was ever sought or obtained. To be sure, there is little question that employers—and their advocates—have a keen interest in rendering class actions more difficult to bring, but the same cannot be said for courts, which should be neutral towards the propriety of class actions. After all, class actions have been a recognized means of adjudicating collective claims for more than seventy years.¹¹

Class actions and their equivalents have also been central to the

9. See, e.g., Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1110 (2013) (“By making massive damages liability turn on the outcome of a single suit, the class action can increase litigation risks so dramatically that defendants might settle even frivolous or weak class actions rather than take their chances at trial.”).

10. The company's potential liability was tied to the size of the class. The discrimination claim was brought pursuant to Title VII, which provides for damages up to \$300,000 per individual for claims of intentional discrimination. The size of the class was hard to pinpoint, and estimates varied between 500,000 and 1.5 million, which would suggest a potential liability of between \$1.5 to \$4.5 billion.

11. The precursor to what is now Rule 23 of the Federal Rules of Civil Procedure was included in the 1938 rules. For a concise history of the rule, which was overhauled in 1966, see A. Benjamin Spencer, *Class Actions, Heightened Commonality and Declining Access to Justice*, 93 B.U. L. REV. 441, 453-54 (2013).

development of employment discrimination law. Many of the early cases were, in fact, class claims; though it should be noted that neither the United States government nor the Equal Employment Opportunity Commission need satisfy the civil procedure requirements of private litigants, and these government agencies were behind many of the early cases.¹² But many of those early cases sought to resolve classwide discrimination, and there was rarely any objection to proceeding on a collective rather than an individual basis.¹³ One reason for this is that when an employer's practice is challenged as affecting a large group of employees, it is more efficient for all sides to proceed collectively rather than through hundreds (or thousands) of individual cases.¹⁴ Employers oppose collective actions not because they are more expensive than individual adjudications but because they are aware that most individuals would never file claims, even if meritorious; individual claims are less expensive due to their absence, not because of the expenses associated with class action litigation. If employers were forced to choose between a class action claim and thousands of individual claims, they would almost certainly choose the class action. But the choice they perceive is different, namely between a class action and no (or a handful of) individual claims, and for a potential defendant, that choice is easy.

Most of the early employment discrimination class action cases were not particularly complicated, and objections to proceeding as a class were rarely raised—many of the cases either involved a policy that was clearly facially discriminatory or that required a court to determine

12. Important early cases that proceeded as class actions included *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *E. Texas Motor Freight Co. v. Rodriguez*, 431 U.S. 395 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The well-known disparate impact case, *Griggs v. Duke Power*, 401 U.S. 424 (1971), appeared to be a class action but neither the Supreme Court nor the appellate court decision make reference to a class. In *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission*, the Supreme Court held that the EEOC (and by implication the Justice Department) could seek classwide relief without obtaining class certification. 446 U.S. 318 (1980). Cases in which the United States pursued the equivalent of class claims included *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Bazemore v. Friday*, 478 U.S. 385 (1986).

13. One exception was *General Telephone Co. of the Southwest v. Falcon*, which the Court relied on extensively in its *Wal-Mart* decision and is discussed further throughout this Article. 457 U.S. 147 (1982).

14. As one noted class action commentator has explained, "Once organized around the systemic treatment of women at the giant Wal-Mart firm, the class action was clearly the superior mechanism to examine a set of institutional practices that either promoted discrimination or allowed the prospect of discriminatory behavior to foster." Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 711-12 (2013).

whether the policy was discriminatory under the law.¹⁵ Problems began to arise when plaintiffs moved away from such challenges and into the more complex issues of widespread, or classwide, discrimination not traceable to a single practice—what are often referred to as subjective employment practices.¹⁶ These practices typically involve the exercise of discretion by company supervisors, often without much formal guidance, and are the type of practices that were at issue in *Wal-Mart*.¹⁷

This movement to challenge companywide subjective employment practices began in the 1980s but accelerated after the passage of the Civil Rights Act of 1991, which made damages available for claims of intentional discrimination, including challenges to subjective decision-making. This addition of a damages remedy immediately and dramatically increased employers' potential exposure to liability. Discrimination claims brought pursuant to Title VII of the Civil Rights Act went from being about modest lost wages, backpay, and attorney's fees to raising the specter of punitive and compensatory damages of up to \$300,000 per class member.¹⁸ This was a substantial change and one that sparked an interest in class claims of intentional discrimination and away from disparate impact claims; but it was a change promulgated by Congress and surely not something courts, as opposed to employers, should have been concerned about, assuming they sought to apply the law in a neutral fashion. Many courts did just that, and one aspect of employment discrimination class action litigation that has proved problematic is that courts often approach the cases from very different perspectives. This schism occurred shortly after Congress passed the 1991 Civil Rights Act, as a number of courts concluded that the new damage remedies rendered class action certification inappropriate because individual damage issues would predominate.¹⁹ This was a

15. See *Dothard v. Rawlinson*, 433 U.S. 321 (1997) (exclusion of women from male prisons); *Bazemore*, 478 U.S. 385 (discriminatory pay policy in place before Title VII became effective against public employers); *City of L.A., Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (women required to contribute more towards pensions because of their presumed longer lifespan).

16. In the Supreme Court, the issue of subjective decision-making came up most directly in *Watson v. Fort Worth Bank*, where the Court held that subjective decision-making could be challenged under the disparate impact model of proof. 487 U.S. 977 (1988).

17. As discussed in the next section, the litigation challenged a number of different practices, but the focus was always on the lack of objective criteria for pay and promotion.

18. The damage provisions that were part of the Civil Rights Act of 1991 are included in a separate statute and provide for damages of up to \$300,000 depending on the size of the employer. See 42 U.S.C. § 1981(a)(3) (2012). It is always worth adding that the damage caps have not been altered since 1991 and, taking into account inflation, those damages are now worth about \$172,000; to bring them to parity with the 1991 levels, the caps should be approximately \$522,000.

19. The most influential case to hold that the new damage provisions generally rendered

substantial change from prior practice when the lost wages or backpay calculations, which always involved individual determinations, were routinely handled through class proceedings.²⁰ Other courts, however, determined that the presence of damages did not remove the cases from appropriate class certification and found a number of ways to certify the discrimination cases.²¹ This circuit split created clear incentives for plaintiffs to file their claims in more receptive jurisdictions and likely contributed to the pressure to bring nationwide class actions in friendly locations rather than to proceed in multiple jurisdictions. At this time, prior to *Wal-Mart*, courts varied considerably in how they approached employment discrimination class actions, with some jurisdictions more receptive than others; the differences in approach seemed to spring from judicial philosophies rather than any neutral principle of law.

Class actions pose two potential problems that warrant judicial scrutiny. The rights of absent class members, for example, certainly fits within a traditional judicial concern; but at the same time, the procedures established by Congress should satisfy whatever due process concerns may exist. Indeed, when the Supreme Court created rights for individuals to challenge prior class settlements during the height of its civil rights hostility, Congress promptly repudiated that decision.²² The Supreme Court has never suggested that the procedural protections of Rule 23 were in conflict with constitutional due process protections, so even a concern for absent class members seems, at this point in time, only a tangential judicial interest.²³ Nevertheless, it is conceivable that an individual could find her claim has already been adjudicated through a class proceeding and would then be denied her day in court. This issue would arise primarily in a 23(b)(2) class action where the class

employment cases unsuitable for class treatment was *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

20. See, e.g., *Senter v. Gen. Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 488 (4th Cir. 1981); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330 (9th Cir. 1977).

21. The Second Circuit was the leader in permitting 23(b)(2) certifications with an occasional nod to what came to be known as a hybrid certification, where the liability phase was certified under 23(b)(2) and the damage phase under 23(b)(3). See *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). The Ninth Circuit, from which the *Wal-Mart* litigation arose, had adopted the approach of the Second Circuit. See *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

22. See *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting collateral challenges to settlement agreements). The case was one of the cases overturned by the Civil Rights Act of 1991.

23. The Supreme Court long ago held that due process requires that absent class members be given notice and an opportunity to opt out of a class action that might lead to substantial money damages. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). For a discussion of what this due process concern requires, see Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002).

challenged an employer's practice, such as a written examination, and failed in that challenge. Ironically, a 23(b)(2) class does not require notice to class members, but the reason for that is because the class members are all similarly situated—if the test is valid for one class member, it is valid for all. Different class members might style their claims differently, but this is an area where the employer clearly benefits by having to defend its practice only once rather than fend off multiple challenges to the same practice. In other words, the rights of absent class members are of concern to putative plaintiffs, which are typically not the interests courts hostile to class actions seek to protect.

The other potential problem is even easier to dismiss—the Supreme Court's apparent concern that large class actions carry with them the potential for extortionate claims or what are also referred to as “blackmail settlements.”²⁴ The argument is relatively straightforward and has played out for several decades: If the cost of litigating a class action will generally exceed the cost of a settlement, regardless of the merits of the claim, some employers (or defendants, more generally) will take the cheapest route and opt to settle. But this is a basic economic concept that applies to litigation strategies generally and is not unique to class actions—whenever litigation costs exceed the likely judgment, there will be economic pressure to settle the case. It should be noted, however, that many employers and defendants resist that temptation.

The difference with class actions is twofold. First, the cost of defending such a claim is likely far higher than the run-of-the-mill lawsuit, and thus, settlements should likewise be higher with the concomitant pressure to settle more frequent. This issue has been extensively addressed in the literature, and suffice it to say, it is not a simple calculation of when lawsuits, including class actions, will lead to settlements that are independent of the merits of the litigation.²⁵ To offer but one simple example: a defendant is likely willing to invest far more resources in a claim that raises substantial liability costs, compared to a low-value case that may not justify substantial resources, making a

24. The concept of a “blackmail” settlement in the context of class actions has seeped into some case law, perhaps most famously in an opinion written by Judge Posner. *In re Rhone Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). For a discussion of the potential for a “blackmail” settlement in the context of the *Wal-Mart* litigation, see Aaron B. Lauchheimer, *A Classless Act: The Ninth Circuit's Erroneous Class Certification in Dukes v. Wal-Mart, Inc.*, 71 BROOKLYN L. REV. 519, 549-52 (2005).

25. See, e.g., John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129 (2009); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002).

smaller claim more likely to settle.²⁶

The second pressure to settle is related but often treated as distinct—many employers will opt to settle in order to avoid a massive judgment even when the probability of suffering such a judgment is low.²⁷ Risk-averse defendants might opt for settling a low-probability but potentially substantial judgment case; but it is difficult to see why a court should seek to protect a defendant in such a situation, simply because there is much at stake. The response, it would seem, is that opportunistic plaintiffs are able to turn a modest claim into a substantial judgment by aggregating hundreds or thousands of weak claims.²⁸ That may be true, but there are other tools to deal with such a situation, including motions to dismiss and sanctions, so that courts would not need to manipulate the standards for class certification in order to protect defendants from weak collective claims. It is also difficult to overlook the irony of law-and-economics-oriented judges and scholars demonstrating sympathy for what they would ordinarily define as an irrational fear by defendants. Not so long ago, it was a hallmark of law and economics that a 50% probability of recovering \$10,000 should be treated the same as a 1% probability of recovering \$500,000. Apparently a defendant's fear of a low-probability but high judgment is now worthy of judicial protection.²⁹ More to the point, there is simply no evidence that extortionate claims have been a problem within employment discrimination class actions. Several studies have documented that

26. For critiques of the basic concept of “blackmail” settlements and explorations of the many factors that play a role in class action strategies, see Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000), and Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003).

27. A common theme along these lines: “By making massive damages liability turn on the outcome of a single suit, the class action can increase litigation risks so dramatically that defendants might settle even frivolous or weak class actions rather than take their chances at trial.” Bone, *supra* note 10, at 1110.

28. The Amicus Brief of DRI—The Voice of the Defense Bar filed in the *Wal-Mart* case made a similar argument: “The inevitable result is to intensify the pressure that a class certification order puts on a defendant to settle, making the class action procedure even more attractive for plaintiffs pursuing frivolous claims.” Brief for DRI—The Voice of the Defense Bar as Amicus Curiae Supporting Petitioner at 20, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011) (No. 10-277).

29. Rationally calculating the expected value of a lawsuit was one of the original insights of law and economics scholars. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067, 1076-77 (1989). The incorporation of behavioral economics has altered some of the analysis of rationality. For a helpful discussion, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

settlement rates are roughly similar between civil class actions and civil claims brought by individuals.³⁰ In the context of employment discrimination cases, employers likely face more pressure to settle cases as a result of adverse publicity, an issue courts have generally not seen fit to consider.³¹ Some have even questioned the social utility of many consumer class actions, particularly those that lead to “coupon” settlements for class members and large fee awards for attorneys, and Congress addressed some of those issues by passing an act relating to class actions.³²

The fact that Congress acted to rein in what were seen as abusive filing practices suggests that this is an area best left to legislative redress rather than restrictive judicial interpretations, a position the Supreme Court staked out many years ago.³³ Even so, there has never been any suggestion that employment discrimination class actions lead to a large number of nuisance settlements, and employees do not receive coupons as part of any settlement. In a study conducted by one of us a number of years ago, it appeared that the damage remedies created by the Civil Rights Act of 1991 led to a surge of filings and a preference for monetary over injunctive relief, but there was no indication that large numbers of weak claims had either been filed or led to substantial relief.³⁴ If anything, the settlements were too modest to serve as an adequate deterrent against discriminatory behavior.³⁵

Not only is there some irony in the Supreme Court’s desire to protect defendants from what they consider “blackmail” settlements, but

30. See Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 DUKE L.J. 1251, 1285 n.129 (2002); Silver, *supra* note 26, at 1401-02.

31. It is always difficult to know what motivates a defendant to settle a claim, and most defendants are unlikely to state that media attention or public pressure was the cause of a particular settlement. In studying several large settlements, it appeared to one of us that adverse media attention often played a substantial role in settlement determinations, particularly in the race discrimination claim against Texaco. See Selmi, *supra* note 4, at 1272-74.

32. Congress passed the Class Action Fairness Act of 2005 to address some of the perceived abuses that arose from class action litigation, including consumer class actions. See Pub. L. No. 109-2, § 2(b), 119 Stat. 4, 5 (2005). The Act has not entirely eliminated abuses attendant to coupon settlements; for a recent and rather critical discussion, see Judge Posner’s decision in *Redman v. Radio Shack Corp.*, 768 F.3d 622 (7th Cir. 2014) (vacating a class settlement).

33. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979) (“[R]espondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than the Courts.”).

34. Selmi, *supra* note 4.

35. *Id.* at 1315 (“[A]t least for the companies studied in this Article, the aggregate settlement amounts are often too small to provide meaningful deterrence.”).

the Court has not expressed a similar concern for the ability of plaintiffs to pursue their claims, which is, after all, the other side of the blackmail coin. Class actions are designed not only to allow adjudication of claims that affect a group similarly, they also provide a vehicle for plaintiffs to pursue claims collectively that would not be economically viable on an individual basis. This has long been true of employment discrimination class actions where the monetary loss of salary can be modest—often too modest to attract competent counsel. As noted previously, in many if not most circumstances, when a class is not certified, it is unlikely that individual cases will ever be pursued. This seems at least as substantial a problem as the potential of nuisance settlements, and yet, in a recent case involving a class action waiver contained in an arbitration agreement, the Supreme Court was entirely dismissive of the lack of viability of individual claims.³⁶ In dissent, Justice Elena Kagan made the argument that is essentially the mirror image of those who express concern regarding the pressure on a defendant to settle: “No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”³⁷ If nothing else, this all goes to show that little is neutral about class actions.

Litigation poses inherent risks of settlement independent of the merits of the underlying claims, and one might conclude that those risks are more intense for class actions. How much more intense, no one can say or predict, and it strikes us as inappropriate that courts would seek to protect defendants by tightening the reins on class certification, particularly for employment discrimination claims where there is no empirical evidence of abuse.³⁸ That is not to say that every employment discrimination class action is meritorious, but it is to say that the complexity of the cases and the relief typically sought (injunctive and monetary) provide some assurance against abusive practices. Equally important, and related to the developments after *Wal-Mart*, courts differ rather substantially in their approaches to class actions; some courts cast a skeptical eye towards the nature of aggregate litigation while others approach the cases from a more neutral stance, allowing them to proceed when the certification rules are satisfied without worrying about

36. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (U.S. 2013) (dismissing the argument that plaintiffs would “have no economic incentive to pursue their antitrust claims individually in arbitration”).

37. *Id.* at 2316 (Kagan, J., dissenting).

38. Then-Judge Sonia Sotomayor made a similar point in response to a dissenting judge’s expressed concern for a blackmail settlement following class certification: “The effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants.” *In re Visa Check/Mastermoney Antitrust Litig. v. Visa USA, Inc.*, 280 F.3d 124, 145 (2d Cir. 2001).

protecting defendants.

III. THE PROBLEM WITH *WAL-MART*

For the conservative members of the Supreme Court, *Wal-Mart* arrived like a much anticipated birthday present. The case represented the largest class action employment discrimination claim ever filed, and the defendant was every liberal's *bête noire*: Wal-Mart, notorious in liberal circles not just for low prices but also for low wages and destroying Main Street in the process.³⁹ The package was even more enticing in that the case arrived from the Ninth Circuit Court of Appeals, still regarded as among the most liberal Circuit courts. It would be difficult for a conservative court to ask for much more, although as it turned out, there was more.

The case became known for its size (more than a million class members when the case reached the Supreme Court), but it also involved complicated issues of statistical proof of discrimination with reliance on social science findings to stitch together the class. Indeed, the opportunity for the Court to criticize the social science findings was like being served an extra piece of birthday cake without even having to ask. As we will see, the Court jumped into the dispute with both feet without considering how its opinion might ultimately be interpreted.

Although the case was larger than usual, its underlying allegations tread on familiar ground. The plaintiffs demonstrated that female employees at Wal-Mart were disproportionately absent from management positions; the basic statistic was that although 70% of the workforce were women, only about one-third of the managers were women.⁴⁰ This was known as a "pattern or practice" case, and under the framework that courts had developed going back some thirty years, this statistically significant disparity between the workers on the floor and the workers in the office was sufficient to commence a claim of

39. A cottage industry has arisen around the effects of Wal-Mart and the literature is substantial. See, e.g., *WAL-MART: THE FACE OF TWENTY-FIRST CENTURY CAPITALISM* (N. Lichtenstein ed. 2013); ANTHONY BIANCO, *WAL-MART: THE BULLY OF BENTONVILLE: HOW THE HIGH COST OF EVERYDAY LOW PRICES IS HURTING AMERICA* (2009); David Neumark, Junfu Zhang & Stephen Ciccarella, *The Effects of Wal-Mart on Local Labor Markets*, 63 J. URBAN ECON. 405 (2008). In several jurisdictions, Wal-Mart met heavy protests and legislation designed to compel the company to pay higher wages and benefits.

40. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (U.S. 2011) (Ginsburg, J., dissenting) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004)) ("Women fill 70 percent of the hourly jobs in the retailer's stores but make up only '33 percent of management employees.'").

intentional discrimination.⁴¹ Importantly, those statistics can start a case, but they do not finish it, and it is necessary for the plaintiffs to provide some explanation for why the statistical disparities are the product of intentional discrimination.

This is where *Wal-Mart* ran aground and where the size became problematic. Conceptually, a “pattern or practice” case lends itself to class treatment because it requires the plaintiff to prove that discrimination was the employer’s “standard operating procedure.”⁴² But in most of these cases, particularly the contemporary ones, there is not a single policy to which one can point as the discriminatory culprit; instead, it will be the employer’s culture or the cumulative effect of its practices that perpetuate discrimination within the firm.⁴³ Again, to this point, there was nothing exceptional about the *Wal-Mart* challenge, and in fact, it was patterned after a long series of cases that involved discriminatory job assignments and promotional practices within grocery stores where it was common for women to be consigned to cash registers and departments that did not lead to managerial roles.⁴⁴

The difficulty with *Wal-Mart* was demonstrating that the disparities were the product of discrimination, and this is where the issues regarding the ultimate merits of the claim and the propriety of class treatment merged. Although Wal-Mart was notorious for its centralized distribution practices, it turned out to be just as notorious for decentralized employment practices. Most of the employment decisions that the class was challenging were made at the store level, and it was not so obvious how all of those decisions were related in a way that would justify class treatment. Store managers individually made hiring, promotion, and salary decisions within a proscribed range, and those decisions were formally approved at a regional level in a way that appeared perfunctory.⁴⁵ This is where the question the Supreme Court confronted came into play: What did the million class members have in common? Could they, for example, point to common practices that had

41. Prior to *Wal-Mart*, the Supreme Court had established the proof standards for “pattern and practice” claims in two cases from the 1970s. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

42. *Teamsters*, 431 U.S. at 336.

43. For a discussion of what is sometimes called structural discrimination, see Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007).

44. For a discussion of the grocery store cases, which began in the 1970s, see Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1 (2005).

45. See *Wal-Mart*, 131 S. Ct. at 2547.

led to the observed gender disparities, and if so, were those common practices attributable to the company?

The plaintiffs sought to address these questions by relying on various forms of evidence, including the social science evidence referenced earlier. By way of an affidavit submitted by an eminent sociologist who had been retained as an expert witness, the plaintiffs sought to show that the discretionary employment system established by Wal-Mart was the very kind of system that led to discriminatory results.⁴⁶ Wal-Mart's system was described as a classic subjective employment system in which management level employees, in this instance primarily store managers, are provided with little guidance on how to make their decisions and instead rely on their own beliefs and discretion to hire, promote, and establish salaries. It is well documented that such a system can lead to discriminatory results when the managers are men who likely rely on stereotypes for their decisions—stereotypes such as women are secondary earners, are not likely to be willing to relocate for a managerial position, and may not even be interested in promotions. This phenomenon is well established, and although a bit outdated, there was nothing particularly controversial about the expert affidavit the plaintiffs submitted.⁴⁷ To the extent there was a problem, the argument made against Wal-Mart, which the plaintiffs buttressed with detailed statistical analyses, could be made against just about any employer that relied on a non-objective hiring or promotion process. This may have been the case's undoing; one could interpret the plaintiffs' argument as stating that a discretionary (subjective) employment system was inherently discriminatory, and that was not an argument the Supreme Court was likely to accept.

To distinguish Wal-Mart, the plaintiffs relied on about 100 affidavits of class members and some scattered evidence about a culture at Wal-Mart that included stereotypical thinking about women. That culture purportedly included references to women at management

46. *Id.* The plaintiffs' primary expert on this issue, William Bielby, had been associated with plaintiff employment discrimination claims for many years. See Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 496-99 (2011).

47. By the time that the case reached the Supreme Court, the Affidavit, which typically did not have research beyond 2000, appears outdated, but that was just a function of the time the case took to reach the Court. Although Bielby's Affidavit accurately described the literature on discrimination and, in particular, the way unguided discretion can lead to discriminatory results, the use of such an affidavit to judge a specific workplace has proved controversial. For a defense of the use of social framework evidence and a discussion of the debate, see Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009).

meetings as “Janie Qs,” holding meetings at strip clubs, and other similar practices designed to show that women were not taken seriously as potential management employees.⁴⁸ But the company’s size and its decentralized employment practices made this evidence all but irrelevant even to neutral eyes. The affidavits of one hundred employees—or one thousand for that matter—do not establish a pattern of discrimination in a company with several million employees, nor does it transform a statistical presentation into a compelling case of discrimination. The expert affidavit, which involved social framework evidence, offered some assistance, but its generic quality made it difficult to conclude that Wal-Mart’s system was anything other than “vulnerable” to discrimination, in the words of the plaintiffs’ own expert.⁴⁹

We have gone into such detail in order to demonstrate how fact specific the *Wal-Mart* case was and to show how the facts led the Court to write an opinion that has proven relatively easy for lower courts to distinguish. The very first line of the opinion begins, “We are presented with one of the most expansive class actions ever,” with the Court adding, “The District Court and the Court of Appeals approved the certification of a class comprising one and a half million plaintiffs, current and former employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.”⁵⁰ One sentence later the Court emphasized Wal-Mart’s uniqueness by noting, “Petitioner Wal-Mart is the Nation’s largest private employer . . . Wal-Mart operates approximately 3,400 stores and employs more than one million people.”⁵¹ Two paragraphs later the Court again mentions that the named plaintiffs represent “1.5 million members of the certified class,”⁵² a fact the Court emphasized again later in the opinion.⁵³

A substantial portion of the opinion—it appears to be more than half—focuses on the plaintiffs’ factual allegations and evidentiary proof. In the first four paragraphs, the Court takes note of the “discretion” vested in managerial decisions four times while also emphasizing the “subjective” nature of that promotional system.⁵⁴ The opinion references supervisor “discretion” on nine additional occasions, making clear that

48. See Brief for Respondents at 19-20, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011) (No. 10-277).

49. *Id.* at 35-36.

50. *Wal-Mart*, 131 S. Ct. at 2547.

51. *Id.*

52. *Id.*

53. *Id.* at 2555.

54. *Id.* at 2547.

one difficulty with certifying this particular class was that the policy at issue was “discretion” that supervisors might exercise in a variety of ways. The sheer size of the defendant—3,400 stores employing more than 1 million people—magnified the problem because, to the Court, it seemed unrealistic that managers across the country would exercise their discretion in a similar fashion absent some corporate policy that guided that discretion. And, as noted above, the plaintiffs’ experts were not able to say more than that they might do so.

In this setting, it was perhaps natural for the Court to look for a discriminatory policy promulgated by the company directing the managers to engage in discriminatory hiring and promotional practices, but while such a search might be natural, it is inconceivable that any such policy would be located—not just at Wal-Mart, but at any company today. Yet, the absence of a discriminatory policy played a significant role in the Court’s decision. On several occasions, the Court stated, “The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.”⁵⁵ Here the Court was emphasizing the lack of commonality among the gigantic class, and there was nothing extraordinary about the Court’s conclusion. Indeed, one could conclude, and it seems that lower courts have moved in this direction, that the Court’s discussion of the lack of commonality under Rule 23 did not break any new ground. Rather, the Court was effectively reviewing the lower court’s decision *de novo* and determined that certification was improper because of a lack of commonality.

The Court, however, did not go so far as to conclude that a subjective decision-making system can never be challenged through a class action. The problem here was that the nationwide scope of the case made it particularly difficult to establish a common pattern of decision-making. As previously noted, the plaintiffs sought to establish commonality through expert testimony regarding how subjective employment decisions often trade on stereotypes that then influence the decision-making process.⁵⁶ The evidence was generic in nature as there was nothing specific about Wal-Mart other than describing its system as subjective. As a result, this evidence was relatively easy for the Court to dismiss, particularly as it related to class certification, because the evidence demonstrated little more than that Wal-Mart relied on discretion in making its promotional decisions—but that fact was never in dispute.

55. *Id.* at 2553.

56. *Id.* at 2547.

Again, these facts render the case relatively easy to distinguish. One can read the Court's decision as holding that certification was inappropriate in the context of a nationwide class action that challenged the exercise of unfettered discretion by thousands of different supervisors located across the country without any common thread. Add a policy or a clear culture of discrimination and the conclusion might be different; downsize the scope of the class or even the size of the employer and the result might also be different; identify a specific practice or directive that might have informed the decision-making, and again, one would be looking at a different case.

In contrast to its excessive focus on the facts, the Court's treatment of the procedural requirements necessary to sustain a class was relatively vapid despite its evident hostility. Justice Scalia primarily relied on the thirty-year old case of *General Telephone Co. v. Falcon* and sprinkled the opinion with other cases from that era.⁵⁷ Although the Court had not previously addressed the requirements for class certification in a "pattern or practice" case, *Falcon* appeared to be an odd choice for such prime treatment. That case involved what was then known as an "across-the-board" class action where certain employees sought to represent applicants and employees throughout the company.⁵⁸ The "commonality" question at issue in *Falcon* was whether there were any common interests between those denied promotions and those denied jobs.⁵⁹ More than anything else, the case was about typicality rather than commonality.⁶⁰ Indeed, the most extensive discussion of commonality regarding *Falcon* is found in the *Wal-Mart* decision, suggesting this was an unusual case to make the centerpiece of employment discrimination class actions and that will also likely make *Wal-Mart* easier to distinguish.⁶¹

57. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). The Court also cited *Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867 (1984).

58. As the Court stated in its opening paragraph: "The question presented is whether respondent Falcon, who complained that petitioner did not promote him because he is a Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner did not hire." *Falcon*, 457 U.S. at 147.

59. The Court stated, "Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans." *Id.* at 150.

60. *Id.* at 159-60 ("Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants.").

61. The Ninth Circuit's en banc decision upholding class certification also turned to the *Falcon* case for guidance, but it did so with a distinctly different approach than the Supreme Court.

The Court changed the law in one way that will impact class certification by shifting from 23(b)(2) to 23(b)(3) when damages are at issue, as they almost always are in employment discrimination class actions.⁶² This shift was actually overdue, and plaintiffs got away with 23(b)(2) certifications for many years after their propriety became dubious. Historically, Title VII class actions have been certified under 23(b)(2) because the statute did not provide for damages; injunctions were the primary remedy sought by the class. That ended with the passage of the Civil Rights Act of 1991, which made damages available in claims of intentional discrimination, and yet, plaintiffs continued to seek certification under 23(b)(2) and many courts supported certification under that provision.⁶³ The primary benefit of a 23(b)(2) certification is that there is no requirement to notify potential class members unless the class claim is successful, which offers a substantial cost savings to counsel for the class.

Yet, in what should have been seen as a highly problematic move, many plaintiff classes—including the *Wal-Mart* case—opted to forego claims for compensatory damages as a way of ensuring that individual issues did not predominate over class claims so as to certify the claim under 23(b)(2). This tactic, which potentially relinquished a significant recovery for some or most class members,⁶⁴ simply delayed the inevitable, which was seeking certification under 23(b)(3), a more costly but certainly not fatal approach. Importantly, contrary to the approach of several lower courts that found the presence of individualized damages defeated class certification under any standard, the Supreme Court clearly held that “individualized monetary claims belong in Rule 23(b)(3).”⁶⁵

We note that certification under 23(b)(2) had appeal beyond the

Most of the Ninth Circuit’s discussion of *Falcon* involved the question of whether the district court should look to the merits of the claim in determining whether class certification was appropriate, a question the court answered affirmatively. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 582-87 (9th Cir. 2010) (en banc). In this regard, the court stated, “*Falcon*’s central command requires district courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings.” *Id.* at 582.

62. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (U.S. 2011).

63. Such certifications were circuit specific. The leading case permitting certification under 23(b)(2) arose in the Second Circuit. See *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001).

64. The Supreme Court took note of this rather perverse fact. *Wal-Mart*, 131 S. Ct. at 2559 (noting that by “declin[ing] to include employees’ claims for compensatory damages in their complaint” plaintiffs created the possibility that “individual class members’ compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from.”).

65. *Id.* at 2558.

obvious cost savings. Unlike other types of class actions, employment discrimination class actions will always seek some change in the employer's practices, and that change in the form of an injunction will run across the class. The clearest example is a challenge to an employer's written examination where the employer will have to alter the examination if the challenge is successful. A case like *Wal-Mart* that involves a challenge to subjective decision-making will also require injunctive relief, but the substance of that relief will often be hortatory rather than specific in nature, along the lines of requiring the employer to "do better." A number of the well-known class action cases led to the formation of a diversity committee that monitored the employer's progress, but it is rare that monitoring is considered more important than monetary relief.⁶⁶

IV. *WAL-MART* IN THE LOWER COURTS

In this section, we seek to illustrate the effect the Supreme Court's *Wal-Mart* decision has had on lower courts, specifically in the context of class certification issues in employment discrimination claims. *Wal-Mart* has been widely cited, but its influence among employment discrimination cases—as opposed to other kinds of civil actions, including collective actions filed under the Fair Labor Standards Act⁶⁷—appears to have been modest and, one might even conclude, minimal. It is always difficult to make these kinds of assessments when the available field for analysis is limited to published decisions, but we believe that in the context of class certification decisions, relying on available published decisions is less a limitation than might be true in other areas; indeed, there is a distinct advantage in trying to measure the effect on class certifications.

As noted previously, class certifications are relatively rare as measured against the pantheon of civil cases, and because they are more substantial, they are also more likely to result in a written decision that is reported in one of the many legal databases. As a result, if *Wal-Mart* is having an effect in the lower courts, it would likely appear among published decisions. Also, when a district court issues a decision on class certification, it is always subject to reconsideration as the case progresses,⁶⁸ and we can assume that most defendants would have

66. See Selmi, *supra* note 4, at 1324-25 (discussing and critiquing diversity committees established as part of class action settlements).

67. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012).

68. FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be

moved to decertify a significant percentage of certified discrimination cases in light of *Wal-Mart*. The process of decertifying a class provides an opportunity to determine whether a case might have achieved class certification before, but not after, the Supreme Court decision and is the strongest indicator of the influence of that decision.

There has not, however, been a rash of decertification decisions. In fact, based on the handful of reported cases involving motions to decertify classes, the requests have failed. Based on published opinions, we found only one case where a court decertified a class after *Wal-Mart*. That case was *Ellis v. Costco*, which was essentially a copycat case brought by the same attorneys who sued Wal-Mart, and the original class certification decision was reconsidered in light of *Wal-Mart*.⁶⁹ The allegations in *Ellis* paralleled those lodged against Wal-Mart—the employer had engaged in subjective decision-making informed by a culture of sex discrimination that affected the company throughout its nationwide operations.⁷⁰ In one other case, one minor claim was decertified while the decision to certify the main claim was affirmed.⁷¹

Contrary to rumblings throughout the legal community that *Wal-Mart* portended the destruction of employment class actions, the decision has not manifested as a death knell for class certification. Several lower court decisions, such as *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*⁷² and *Scott v. Family Dollar Stores, Inc.*,⁷³ have illuminated post*Wal-Mart* paths to class certification, signaling the continuing viability of class actions.

In *McReynolds*, the Seventh Circuit reversed the district court's denial of class certification to a class of plaintiffs alleging racial discrimination under a disparate impact theory.⁷⁴ Seven hundred African-American brokers, who were current or former employees of Merrill Lynch, based their claims on two policies that allegedly served as a framework for discretionary decisions that influenced compensation

altered or amended before final judgment.”). See *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980) (noting that a court “must be prepared under Rule 23(c)(1) to alter or amend [a certification order] if the court of the trial on the merits reveals the impropriety of class action maintenance” and that the reviewing court must likewise be prepared to review the propriety of class certification).

69. See *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) (vacating certification decision and remanding to district court for application of appropriate standard).

70. *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 634-35, 638 (N.D. Cal. 2007).

71. See *Parra v. Bashas' Inc.*, 291 F.R.D. 360 (D. Az. 2013).

72. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), cert. denied, 133 S. Ct. 338 (2012).

73. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105 (4th Cir. 2013).

74. *McReynolds*, 672 F.3d at 483.

and were delegated to lower level managers.⁷⁵ The challenged policies included a “teaming” policy that allowed brokers in the same office to form “teams” and determine team membership and an “account distribution” policy where, upon a broker’s departure from the company, the company would distribute those accounts to competing brokers with the best records, as determined by company criteria.⁷⁶ The lower level management had a measure of control over how the teaming and account distribution operated. For example, they could veto teams or provide input for account distribution criteria—but ultimately, their decisions were guided by the two companywide policies: “authorization to brokers, rather than managers, to form and staff teams; and basing account distributions on the past success” of competing brokers.⁷⁷

The class alleged that the companywide policies enabled racial discrimination, thus causing a “disparate impact,” as brokers often formed their teams along racial lines. As a result, African-American employees experienced difficulty joining the predominantly white teams, resulting in a cycle of perpetuating disadvantages—team membership was associated with higher revenue, more clients, success in competing for account distribution when a broker left the office, and positive performance evaluations, which in turn influenced pay and promotions.⁷⁸

Judge Richard Posner, writing for the court, distinguished the *McReynolds* class from the *Wal-Mart* class primarily based on the existence of discernible, overarching policies from top management at Merrill Lynch. The policies served as the framework for discretionary decisions of lower level managers and brokers. Judge Posner described *Wal-Mart*’s holding rather narrowly:

[I]f employment discrimination is practiced by the employing company’s local managers, exercising discretion granted them by top management (granted them as a matter of necessity, in *Wal-Mart*’s case, because the company has 1.4 million U.S. employees), rather than implementing a uniform policy established by top management to govern local managers, a class action by more than a million current and former employees is unmanageable; the incidents of discrimination complained of do not present a common issue that could be resolved efficiently in a single proceeding.⁷⁹

Thus, a policy meant to “govern” local managers’ discretion

75. *Id.* at 487.

76. *Id.* at 488-89.

77. *Id.* at 489.

78. *Id.* at 489.

79. *Id.* at 487.

differentiates viable employment discrimination class actions that satisfy Rule 23's commonality requirement from those with the *Wal-Mart* class's infirmities.⁸⁰

The *McReynolds* class alleged two such governing policies instituted by Merrill Lynch's top management—the teaming policy and the account distribution policy. Although discretion was allocated to brokers and local managers, the teaming and account distribution policies were practices of the employer, “rather than practices that local managers [could] choose or not at their whim.”⁸¹ The corporate policies were the overarching guidelines within which local managers and brokers had to exercise their discretion, whereas Wal-Mart was found to have lacked a uniform companywide policy by which local managers had to abide when exercising their delegated discretion in making employment decisions.⁸² The common issues under the plaintiffs' disparate impact theory were therefore whether the policies caused racial discrimination and whether they were justified by business necessity—issues “most efficiently determined on a class-wide basis rather than in 700 individual lawsuits.”⁸³

Ultimately, the plaintiffs secured a \$160 million commitment from Merrill Lynch to establish a common fund for the *McReynolds* class members, which included “all African-American financial advisers and financial adviser trainees” employed at the company after May 6, 2011—a class much larger than the 700 individuals to which the *McReynolds* decision would have limited class treatment.⁸⁴ The

80. The court also seems to place emphasis on the size of the employer and the size of the class as factors that may influence whether class treatment is appropriate. For example, although the possibility that an employer with millions of employees could institute a companywide policy to govern the discretion of all its local managers was not ruled out, the court seems to suggest this is an unlikely situation. *Id.* at 487. Further, the court seems to consider the size of the class (“more than a million current and former employees”) as a key factor in finding the *Wal-Mart* class unmanageable. *Id.* at 487. The *McReynolds* class of 700 current and former employees is miniscule in comparison.

81. *Id.* at 490 (finding the case to survive *Wal-Mart*, which showed “on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls”).

82. *Id.* at 487.

83. *Id.* at 489-90.

84. Ben James, *\$160M Merrill Race Case A Road Map for Future Class Actions*, LAW360 (Sept. 5, 2013, 7:32 PM), www.law360.com/articles/469131. Although the precise motivations behind any settlement agreement tend to be rather delphic, the court's assertion that “should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained,” and its observation that an erroneous injunction against Merrill Lynch's teaming and account distribution policies “could disadvantage it in competition with brokerage firms that employ similar policies” may have been relevant considerations.

settlement agreement also incorporated injunctive relief, including Merrill Lynch's commitment to scrutinize and restructure its teaming and account distribution policies, and to implement professional development programs for its African-American Financial Advisors and Financial Advisor Trainees.⁸⁵

Almost two years after *McReynolds*, the Fourth Circuit weighed in on the contours of the requirements for class certification under *Wal-Mart* in *Scott v. Family Dollar Stores, Inc.*⁸⁶ The court found allegations of a uniform corporate policy and decisionmaking from higher-level management satisfied the commonality requirement for class certification and kept alive a proposed nationwide class of females who were current or former Family Dollar Store managers alleging they were paid less than their male counterparts.⁸⁷ Their gender discrimination claims included allegations of disparate impact and pattern-or-practice of disparate treatment in violation of Title VII.⁸⁸

The plaintiffs challenged four companywide policies set by corporate headquarters, including (1) mandatory salary ranges for Store Managers which allegedly locked in disparities; (2) annual pay raise percentages that were tied to performance ratings; (3) “built-in headwinds” compensation criteria for Store Managers” that allegedly caused a disparate impact; and (4) a “dual pay” compensation scheme that provided less compensation to individuals promoted to Store Manager than to individuals hired from outside the company.⁸⁹

As was true with *McReynolds*, the district court had initially granted Family Dollar Stores’ motion to dismiss or strike the class claims, which argued that dismissal was compelled by the Supreme Court’s decision in *Wal-Mart*.⁹⁰ The district court concluded that, as a matter of law, the plaintiffs could not satisfy the commonality requirement under *Wal-Mart* because they alleged gender discrimination based on “subjective decisions made at the local store levels.”⁹¹

A divided panel of the Fourth Circuit reversed the district court’s denial to plaintiffs of leave to amend their complaint, finding the court

McReynolds, 672 F.3d at 491.

85. See Settlement Agreement and Release, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583, 2012 WL 5278555 (N.D. Ill. Aug. 28, 2013) (No. 585-1).

86. See *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117 (4th Cir. 2013), *reh’g denied*, 743 F.3d 886 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (U.S. 2014).

87. *Id.* at 108.

88. *Id.* at 108-09.

89. *Id.* at 110.

90. *Id.* at 109.

91. *Id.* at 110 (internal quotations omitted).

had relied “on an erroneous interpretation of *Wal-Mart*.”⁹² The court declined to interpret *Wal-Mart* as a per se bar to class certification where plaintiffs alleged subjective discretion and noted two principles “readily derived” from the decision. First, where plaintiffs allege subjective-decision making or discretion, managers must exercise discretion “in a common way with . . . some common direction.”⁹³ Thus, plaintiffs must show “the exercise of discretion is tied to a specific employment practice,” which may include a companywide policy or culture of discrimination, and that the practice “affected the class in a uniform manner.”⁹⁴

The second principle the court derived from *Wal-Mart* was that commonality is more likely to be satisfied when “high-level corporate decision-makers” exercise control over discretionary decisions.⁹⁵ Drawing on *McReynolds*, the court noted that high-level corporate managers instituted Merrill Lynch’s teaming and account distribution policies, and while local managers exercised an amount of discretion, their decisionmaking was guided by the companywide policies.⁹⁶ This differed from *Wal-Mart*, in which the plaintiffs did not allege a uniform, companywide policy guiding each of the independent, local supervisors at every Wal-Mart store throughout the country who were “vested with almost absolute discretion over pay and promotion decisions.”⁹⁷ Plaintiffs here alleged that corporate decision-makers, who had “authority over a broad segment of Family Dollar’s employees,” had the requisite control over discretionary decisions.⁹⁸ For example, corporate Vice Presidents could grant upward exceptions to salary ranges and allegedly did so more often in favor of men.⁹⁹ Additionally, Regional Managers and Divisional Vice Presidents could grant upward exceptions to the pay raise percentage and allegedly did so significantly more often for men.¹⁰⁰ The dual pay policy was also a companywide policy in place at every Family Dollar Store that guided all decisions regarding pay of

92. *Id.* at 108.

93. *Id.* at 113 (internal quotations and citation omitted).

94. *Id.* (internal quotations and citation omitted).

95. *Id.* at 114.

96. *Id.* at 115.

97. *Id.* at 115, 117.

98. *Id.* at 118.

99. *Id.* at 116.

100. *Id.* The court suggests the “Regional Managers” and “Divisional Vice Presidents” are “high-level corporate decision-makers,” but under the court’s reasoning it may also be sufficient that the policies they followed in exercising their discretion were instituted at the corporate level, regardless of whether they are high-level corporate decision-makers.

hirees and promotees.¹⁰¹

The *Scott* decision included a concurrence, which specified the “straightforward and limited” nature of the decision, and a blistering dissent, which alleged that the majority opinion “drained [*Wal-Mart*] of meaning.”¹⁰² In her concurrence, Judge Barbara Keenan emphasized what she considered to be the court’s narrow holding: “that the plaintiffs should be permitted to amend their original complaint after a dramatic shift in the law regarding class action certification.”¹⁰³

Judge J. Harvie Wilkinson’s dissent asserted that under *Wal-Mart*, nationwide classes will rarely meet Rule 23’s certification requirements.¹⁰⁴ He considered *Scott* almost identical to *Wal-Mart*, as both proposed classes encompassed thousands of “retail-level” current and former employees, and alleged discrimination against a national chain with thousands of stores in more than forty states.¹⁰⁵ According to Judge Wilkinson, the majority opinion unduly limited *Wal-Mart* to cases in which low-level managers have complete discretion and implement their decisions on an “individual store level.”¹⁰⁶ In his view, both cases fail to satisfy Rule 23’s commonality requirement because the decisionmaking structures were characterized by “dispersed decision-makers exercising discretion . . . free of direct corporate control and oversight,” despite some centralized corporate policies that minimally constrained the decisionmaking.¹⁰⁷ Ultimately, the dissent found the majority opinion punished companies “for nothing more than being companies” and forewarned that if “centralized delegations of discretion” and “common management techniques” are “enough for a nationwide class action to get rolling, then few companies will be exempt.”¹⁰⁸

A third case provides further indication that courts may be likely to distinguish rather than apply *Wal-Mart*, but it also suggests some of the hurdles plaintiffs may face, particularly at the district court level. The case, *Stockwell v. City & County of San Francisco*, involved an age discrimination challenge brought by a group of police officers who

101. *Id.* at 117.

102. *Id.* at 119 (Keenan, J., concurring) (Wilkinson, J., dissenting).

103. *Id.* (Keenan, J. concurring).

104. *Id.* at 134-35 (Wilkinson, J., dissenting) (“The gravamen of [*Wal-Mart*] is that *nationwide* classes face a steep climb to certification under Rule 23” and “class certification could . . . be more suitable for more modest . . . groups, such as district-level clusters”).

105. *Id.* at 120.

106. *Id.* (internal quotations omitted).

107. *Id.* at 120, 130.

108. *Id.* at 120.

objected to the City's decision to stop using the results of a 1998 examination because of its disparate impact.¹⁰⁹ The district court denied class certification for lack of commonality, and the Court of Appeals reversed by exploring the meaning of commonality post*Wal-Mart*.

Relying on *Wal-Mart*, the court noted that "even a single common question will do" and added that, while some consideration of the merits would likely prove necessary, "demonstrating commonality does not require proof that the putative class will prevail on whatever common questions it identifies."¹¹⁰ This distinction between the commonality inquiry and the merits related directly to the district court's error in denying class certification. The district court questioned the relevance of the plaintiffs' statistical evidence demonstrating a disparate impact, suggesting the absence of a regression analysis rendered the evidence of little probative value.¹¹¹ The Ninth Circuit, however, saw the issue differently, noting that whether the plaintiffs could succeed in demonstrating a substantial adverse impact went to the merits rather than the certification question of whether the class members had an issue in common sufficient to warrant class treatment.¹¹² That issue was rather straightforward: this was a disparate impact case that pointed to the abandonment of the old test as causing a disparate impact, and all of the class members would have been eligible for promotion from the old test. In other words, this was a traditional disparate impact case challenging a single policy and therefore identifying a common practice sufficient to satisfy Rule 23(b)(2).¹¹³

109. See *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1109 (9th Cir. 2014). The history of the case and the underlying claim were complicated and a little puzzling. The case was originally filed in 2008 when the Department began to make promotions for investigation positions from a new test (Q50) instead of the preexisting list from the earlier exam (Q35). The purported class was comprised of individuals who were eligible for promotion from the older list, and they alleged that switching to the new test caused a disparate impact based on age; there were also allegations relating to a "pattern and practice" claim. The district court denied class certification, the plaintiffs filed an amended claim, and the district court again denied class certification; that decision was appealed to the Ninth Circuit. The puzzle is why that process took six years with a relatively small class and a limited claim.

110. *Id.* at 1112. Borrowing from its recent decision in the *Costco* case, the court added: "[W]hether class members could actually prevail on the merits of their claims' is not a proper inquiry in determining the preliminary question 'whether common questions exist.'" *Id.* (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

111. *Id.* at 1115.

112. *Id.*

113. In a case that sought decertification after *Wal-Mart* in a challenge to a physical fitness case, the court denied the motion opting instead to create a hybrid class that was certified under 23(b)(2) for liability purposes and 23(b)(3) for damages. See *Easterling v. State Dept. of Corrections*, 278 F.R.D. 41 (D. Conn. 2011).

The significance of the case is the fact that the district court somehow saw the case differently in light of *Wal-Mart*, but the two situations could hardly be more different. *Wal-Mart* involved a nationwide claim alleging that the discretion invested in supervisors created a companywide pattern of intentional discrimination, and *Stockwell* involved a single policy implemented by a single employer that allegedly caused a disparate impact based on age. Courts sometimes get a decision wrong for any number of reasons, and it may be that the court here was led astray by the language employed in *Wal-Mart*, but the case might also provide a sign of the hurdles plaintiffs may have to overcome in the post-*Wal-Mart* era, even though an appellate court might be lurking in the wings to help sort things out.¹¹⁴

We do not mean to suggest that *Wal-Mart* had no effect on employment discrimination class actions. Cases that closely resemble *Wal-Mart*, like the *Ellis v. Costco* case mentioned earlier, that involve nationwide challenges to subjective employment practices, are unlikely to obtain class certification.¹¹⁵ But it is important to emphasize that in many circuits those claims did not obtain class certification before *Wal-Mart*, and it seems that jurisdictions receptive to class actions have many ways to distinguish the case. We also suggest that plaintiffs must reconsider how they use so-called social framework evidence, given how hostile the Supreme Court was to the use of such evidence in the *Wal-Mart* litigation. Social framework evidence is designed to explain how discrimination infiltrates work cultures even without overt expressions of bias, and the evidence can prove enlightening to courts or juries who are likely unaware of just how pervasive discrimination remains. It is too early to know how plaintiff attorneys might retool this evidence, but it would certainly be helpful if plaintiffs were able to make specific claims about the particular defendant's practices rather than offering what amounts to a generic lecture on the nature of contemporary discrimination. Given that the Court's criticism of the social framework evidence was clearly dicta, it is also quite possible that some courts will permit the use of the evidence in its unvarnished previous form.

One other development is worthy of note. Following the Supreme

114. *Stockwell v. City & Cnty. of San Francisco*, No. C-08-5180 PJH, 2011 U.S. Dist. LEXIS 117234 (N.D. Ca. Oct. 11, 2011).

115. One such claim involved a gender discrimination challenge to the hiring of entry-level sales associates against the company Cintas. In denying class certification the court noted, "As in *Dukes*, the gravamen of [the plaintiffs'] claims is not that . . . objective criteria led to an anti-female bias but that subjective decisions made by some of Cintas's managers favored males because of Cintas's male-dominated culture." *Davis v. Cintas Corp.*, 717 F.3d 476, 488 (6th Cir. 2013).

Court's decision in *Wal-Mart*, the plaintiffs began to file smaller regional class actions across the country to get around the notion that the problem with its nationwide class was primarily its size. As noted above, lower courts have seized on the size of the *Wal-Mart* class as a way of limiting the influence of that case, and yet, that has not been true of the courts that have tackled the regional Wal-Mart claims, all of which to date have failed to gain class certification.¹¹⁶ It is not easy to reconcile the consistent treatment of these regional class actions with other cases courts have certified as class actions except to suggest that the damning language in the Supreme Court decision regarding the plaintiffs' claims may be too difficult to ignore or distinguish in the splintered cases.

V. CONCLUSION

Class actions are an important, if imperfect, means of eradicating systemic workplace discrimination. As discussed above, many, and this seems to include a majority on the Supreme Court, see class actions in a very different light; namely, as a means to extort vulnerable employers to settle dubious claims. This latter view informed the Supreme Court's decision in *Wal-Mart*, but lower courts sympathetic to class action claims have found ways to distinguish that case and to continue to certify claims that share a common core. In other words, *Wal-Mart* did not fundamentally change the class action landscape; rather, courts will likely continue to approach class action claims much as they did before the case was decided.

116. See *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115 (N.D. Cal. 2013) (smaller class dismissed); *Love v. Wal-Mart Stores, Inc.*, No. 12-61959-Civ., 2013 U.S. Dist. LEXIS 143234 (S.D. Fla. Sept. 23, 2013); *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875 (M.D. Tenn. 2013); *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-O, 2012 U.S. Dist. LEXIS 159351 (N.D. Tex. Oct. 15, 2012), *rev'd*, 747 F.3d 315 (5th Cir. 2014).